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REPORT OF THE SECRETARY-GENERAL REGARDING PARAGRAPH 3 OF SECURITY COUNCIL RESOLUTION 687 (1991)

1. The present report is submitted pursuant to Security Council resolution 687 (1991) of 3 April 1991. In paragraph 3 of the resolution, the Security Council called upon me to lend assistance to make arrangements with Iraq and Kuwait to demarcate the boundary between Iraq and Kuwait, drawing on appropriate material, including the map transmitted by Security Council document S/22412, and to report back to the Security Council within one month.

2. In lending my assistance to Iraq and Kuwait with a view to making the arrangements to demarcate the boundary between them, I have borne in mind that, in paragraph 2 of Security Council resolution 687 (1991), the Council demanded "that Iraq and Kuwait respect the inviolability of the international boundary and the allocation of islands set out in the 'Agreed Minutes between the State of Kuwait and the Republic of Iraq regarding the Restoration of Friendly Relations, Recognition and Related Matters', signed by them in the exercise of their sovereignty at Baghdad on 4 October 1963 and registered with the United Nations and published by the United Nations in document 7063, United Nations, Treaty Series, 1964". I have also taken into account that, in a letter dated 4 April 1991 addressed to me by the Deputy Prime Minister and Minister for Foreign Affairs of Kuwait, Kuwait has expressed its intention to scrupulously comply with all the provisions of resolution 687 (1991) and to cooperate with me with a view to ensuring its implementation (S/22457, annex) and that, in accordance with paragraph 33 of Security Council resolution 687 (1991), the Minister for Foreign Affairs of Iraq in the penultimate paragraph of a letter dated 6 April 1991 (S/22456) has notified the Security Council and the Secretary-General of Iraq's acceptance of the provisions of that resolution. The text of the Agreed Minutes referred to in paragraph 2 of Security Council resolution 687 (1991) is contained in Security Council document S/22432.

3. After consultations with the Governments of Iraq and Kuwait, I will now establish an Iraq-Kuwait Boundary Demarcation Commission, to be composed of one representative each of Iraq and Kuwait and three independent experts who will be appointed by me, one of whom will serve as the Chairman. The Council will be informed as soon as the Commission is established. The terms of reference of the Commission will be to demarcate in geographical coordinates of latitude and longitude the international boundary set out in the Agreed

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Minutes between Kuwait and Iraq referred to above. In view of the fact that one of the main purposes of the demarcation of the boundary between Kuwait and Iraq is to promote stability and peace and security along the border, the Commission will also make arrangements for the physical representation of the boundary. The coordinates established by the Commission will constitute the final demarcation of the international boundary between Iraq and Kuwait in accordance with the Agreed Minutes of 4 October 1963. They will be lodged in the archives of both Governments and a certified copy will also be submitted to me, which I will communicate to the Security Council and will retain for safe-keeping in the archives of the United Nations.

4. The demarcation of the boundary between Iraq and Kuwait will be accomplished by drawing upon appropriate material, including the map transmitted by Security Council document S/22412, and by utilizing appropriate technology. The physical representation of the boundary will be carried out through the erection of an appropriate number and type of boundary pillars or monuments. The Commission will provide for arrangements for maintenance on a continuing basis and locational accuracy (including repositioning, if necessary) of the surficial boundary representation.

5. As soon as the Commission is constituted and after an initial assessment of the resources required for the demarcation of the boundary has been made, the Commission will transmit to me an estimate of costs, which I will communicate to the Security Council; simultaneously, I will make a proposal that all costs, including the initial costs of the Commission, should be shared between the two interested parties.

6. The Commission will be assisted by a small staff that will adopt its own rules of procedure and working methods and make the necessary arrangements for the identification and examination of appropriate material relevant to the demarcation of the boundary. The Commission will be responsible to me in the conduct of its work and will report regularly to me on the progress of its work with a view to the earliest possible finalization of the demarcation of the boundary. The Commission will take its decisions by majority. Its decisions regarding the demarcation of the boundary will be final.

7. The Commission shall enjoy unimpeded freedom of movement in the area of the demarcation of the international boundary as well as all necessary privileges and immunities for the fulfilment of its task. The three independent experts shall enjoy the status of experts on missions within the meaning of article VI of the Convention on Privileges and Immunities of the United Nations of 1946. 1/

8. In the exercise of its task of demarcating the boundary, with respect to physical security and clearance of mines the Commission will rely on the relevant arrangements made for the United Nations Iraq-Kuwait Observer Mission (UNIKOM).

Notes

1/ General Assembly resolution 22 A (I).

Annex I

Letter dated 19 April 1991 from the Permanent Representative of Kuwait to the United Nations addressed to the Secretary-General

I should like to refer to the report regarding paragraph 3 of Security Council resolution 687 (1991) and to convey the acceptance by the Government of Kuwait of the terms set out in the report and its readiness to cooperate with the United Nations in implementing those terms.

(Signed) Mohammad A. ABULHASAN
Ambassador
Permanent Representative

Annex II

Letter dated 23 April 1991 from the Permanent Representative of Iraq to the United Nations addressed to the Secretary-General

[Original: Arabic]

On instructions from my Government and with reference to the meeting that we held with the Legal Counsel of the United Nations, Mr. Fleischhauer, on 17 April 1991, I have the honour to transmit herewith a letter addressed to you by Mr. Ahmed Hussein, Minister for Foreign Affairs of the Republic of Iraq, dated 23 April 1991 concerning the Iraq-Kuwait Boundary Demarcation Commission.

(Signed) Abdul Amir A. AL-ANBARI
Ambassador
Permanent Representative

Enclosure

Letter dated 23 April 1991 from the Minister for Foreign Affairs of Iraq addressed to the Secretary-General

[Original: Arabic]

With reference to the meeting held between our Permanent Representative and the Legal Counsel of the United Nations on 17 April 1991 and your draft report which you intend to submit to the Security Council concerning paragraph 3 of Security Council resolution 687 (1991) and regarding which you asked for the view of my Government, I have the honour to state the following.

Part I of the letter that I addressed to you on 6 April 1991 explained that, although in its preamble Security Council resolution 687 (1991) affirms that Iraq is an independent sovereign State, many of its iniquitous provisions do not respect this sovereignty but constitute an unprecedented assault on it and on the rights that stem therefrom, embodied in the Charter and in international law and custom. With regard to the question of the boundary, the Security Council has imposed a specific position with regard to the Iraqi-Kuwaiti boundary, whereas the custom in law and in practice in international relations is that boundary questions are left to an agreement between States, because this is the sole basis that can guarantee the principle of the stability of boundaries.

Furthermore, the Council resolution does not take into account the viewpoint of Iraq, namely, that the "Agreed Minutes between the State of Kuwait and the Republic of Iraq regarding the Restoration of Friendly Relations, Recognition and Related Matters" of 4 October 1963 have not yet been subjected to the constitutional procedures required for their ratification by the legislative authority and the President of Iraq, thus leaving the question of the boundary pending and unresolved. The Council has nevertheless imposed on Iraq the line of its boundary with Kuwait. By acting in this strange manner, the Council itself has also violated one of the provisions of resolution 660 (1990), which was the basis for the subsequent resolution adopted by the Council. In its paragraph 3, resolution 660 (1990) called upon Iraq and Kuwait to resolve their differences through negotiations, and the question of the boundary is well known to be one of the main differences. Iraq officially informed the Council that it accepted resolution 660 (1990) and was prepared to implement it, but the Council has disregarded this legal position, contradicting its previous resolutions, and adopted an iniquitous resolution that imposes new conditions on Iraq. It has imposed a border situation on Iraq, an independent sovereign State and Member of the United Nations, and has deprived it of its right to establish its territorial rights in accordance with the principles of international law. Thus the Council would also deprive Iraq of the right to exercise its free choice and to affirm that it accepts that boundary without reservation. Where the question of the boundary is concerned, the Council resolution is an iniquitous resolution, which constitutes a dangerous precedent, a first in the annals of

the international Organization and - as some impartial members of the Council indicated in their statements when the resolution was voted on - an assault on the sovereignty of States.

The Iraqi Government remains convinced of the legitimate character of the position reflected in the above observations. This legitimate character is especially borne out by the mission entrusted to you by virtue of paragraph 3 of resolution 687 (1991). The above-mentioned paragraph calls upon you to lend your assistance to make arrangements with Iraq and Kuwait to demarcate the boundary between Iraq and Kuwait, drawing on appropriate material, including the map transmitted by Security Council document S/22412.

Accordingly, my Government wishes to make the comments set forth below concerning your draft report to which I referred above.

1. My Government wonders on what legal foundation the Council based its resolution 687 (1991) and you your draft report in considering the map that was transmitted by Security Council document S/22412, dated 28 March 1991, at the request of the Permanent Mission of the United Kingdom and which your Legal Counsel described to our Permanent Representative as a United Kingdom map mentioned in the Agreed Minutes of 1963. The Agreed Minutes did not refer to any map, as is clear from the text published in the United Nations Treaty Series, vol. 485, No. 7063. It is blatantly true also that the sole mention of the map in question in paragraph 3 of Council resolution 687 (1991) was introduced without any legal grounds.

The Government of my country was not a party to the drawing of that map. It did not recognize the map, nor is there any proof of its having extended such recognition. Accordingly, the fact that you and the Council consider the map to be a part of the material to be drawn upon for the demarcation process constitutes an iniquitous and unilateral imposition against the will of Iraq, a sovereign State Member of the United Nations, and a prejudgement of the course of the land boundary before any commission embarks on the process of demarcating that boundary.

2. In addition, the assistance that you have offered in making arrangements for the demarcation of the boundary between Iraq and Kuwait must ensure a perfect balance between the positions that either side may adopt with regard to the demarcation process, together with a just and equitable approach to the settlement of any differences that might arise between them concerning technical matters. The Iraqi Government therefore believes that, if the Commission entrusted with the demarcation process is constituted in accordance with your proposal, the result cannot be just and equitable, particularly in view of our comments in paragraph 1 above. You have suggested that the Commission consist of five members, of whom two would represent Iraq and Kuwait respectively, together with three independent experts to be chosen by you, one of whom would be appointed as the Chairman. You have also suggested that the Commission's decisions should be taken by a majority vote. Although it has no doubts as to your credibility with respect to the selection of the three independent experts, my country's Government nevertheless believes that,

since it will play no part in the selection of the three experts, it will have no way of ensuring in advance that they are truly independent. Its views with regard to the demarcation process will thus be represented only by one of the five members.

3. You mention in the draft report that the demarcation of the boundary will be accomplished by drawing upon appropriate material, including the map transmitted by Security Council document S/22412, as referred to in paragraph 3 of resolution 687 (1991). However, you add that the Commission may "utilize appropriate technology" (para. 4 of the draft report) and that it will "make the necessary arrangements for the identification and examination of appropriate material relevant to the demarcation of the boundary" (para. 6 of the draft report). The Government of Iraq believes that the terms "appropriate material", "appropriate technology" and "identification and examination of appropriate material relevant to the demarcation of the boundary" must be explained. This explanation will permit my Government to express its views, if such views are welcome, on a solid basis. The requested explanation will also help to reduce the possibilities of disagreement in the future when the Commission begins its work.

4. You propose in paragraph 5 of the draft report that the costs of the demarcation process should be shared between the two parties. The Government of Iraq fails to understand the basis for this proposal, since the overall thrust of the proposals contained in the draft report amounts - in the opinion of my Government - to a virtual "act of capitulation" in which Iraq is denied any freedom to join in the harmonious agreement on its contents. Accordingly, and in the light of my comments at the beginning of this letter, the suggestion seems to be that Iraq should bear half the costs of the demarcation process without any account being taken of its views on the boundary question as a whole, with respect to either demarcation or delimitation. The Iraqi Government cannot therefore see any justification, based on principles of justice or equity, for bearing any costs relating to a process which is imposed upon it.

I should like, in conclusion, to assure you that the Iraqi Government is fully prepared to consult with you concerning the comments contained in this letter, either in New York or elsewhere. In this connection, I also wish to note that, just as we accepted resolution 687 (1991) despite our objections to and criticism of its provisions, we will cooperate with you and will nominate a representative of our Government to participate in the Demarcation Commission, even if you take no account of the views and comments we have expressed above. We do this because the circumstances forcing our acceptance persist.

(Signed) Ahmed HUSSEIN
Minister for Foreign Affairs
Baghdad, 23 April 1991

Annex III

Letter dated 30 April 1991 from the Secretary-General addressed to the Minister for Foreign Affairs of Iraq

I have the honour to refer to your letter dated 23 April 1991, which was transmitted to me by a letter of the same date from the Permanent Representative of Iraq to the United Nations and which contained comments on the proposals made with regard to the implementation of paragraph 3 of Security Council resolution 687 (1991) and on which I must report to the Security Council no later than 2 May 1991. In informing me of your Government's readiness to cooperate with me and to nominate a representative of Iraq to participate in the proposed Boundary Demarcation Commission, a decision which I welcome, the letter nevertheless contains a number of comments to which I would like to respond.

The first comment of your Government is that, in international law, a boundary demarcation between two States can be carried out only by agreement between the parties and that the Security Council has no competence to impose such a demarcation. In this connection, I would like to recall that, in paragraph 2 of resolution 687 (1991) the Security Council, acting under Chapter VII of the Charter of the United Nations demanded that Iraq and Kuwait respect the inviolability of their international boundary and the allocation of islands "set out in the 'Agreed Minutes between the State of Kuwait and the Republic of Iraq regarding the Restoration of Friendly Relations, Recognition and Related Matters', signed by them in the exercise of their sovereignty at Baghdad on 4 October 1963". In paragraph 3 of that resolution the Council called upon me to lend my "assistance to make arrangements with Iraq and Kuwait to demarcate the boundary between Iraq and Kuwait". In identical letters dated 6 April 1991 addressed to me and to the President of the Security Council (S/22456), your Government formally notified its acceptance of the provisions of that resolution. You further reconfirmed your Government's acceptance of paragraph 3 of resolution 687 (1991) at the end of your letter of 23 April 1991 (see annex II, enclosure). Therefore, the element of agreement as far as Iraq is concerned, is provided by your Government's official notifications of acceptance. Since the Government of Kuwait has also expressed to me its willingness scrupulously to comply with all provisions of the resolution and to cooperate with me to ensure its implementation (S/22457), the necessary element of consent has been provided by the two parties.

Secondly, your Government states that the proposed demarcation would be prejudged by a specific reference to a map made available by the United Kingdom and which, according to the letter, the Legal Counsel described as "a United Kingdom map mentioned in the agreed minutes of 1963". On a purely factual point, I wish to state that the Legal Counsel of the United Nations did not describe the map as having been mentioned in the 1963 agreed minutes. In response to a question as to which map was referred to in document S/22412, your Permanent Representative was informed that the map in question was "a

United Kingdom map". On a substantive level, however, I am obliged to point out that the resolution provides that the demarcation of the boundary should be based on "appropriate material, including the map transmitted by Security Council document S/22412" [emphasis added]. In the light of this wording, I have proposed that the Commission will have to make "necessary arrangements for the identification and examination of appropriate material relevant to the demarcation of the boundary".

Thirdly, your Government queries the independence of the experts to be appointed by me to serve on the Boundary Commission and comments on the proposed decision-making by majority. I would like to assure you that, in appointing the independent experts of the Commission, I shall, as always, base my decisions on the need to ensure independence, competence and integrity. Furthermore, to ensure an equitable approach and the effective functioning of the Commission, I have proposed that neither Government should be able to frustrate the work of the Commission.

Fourthly, your Government has requested me to explain such terms as "appropriate material", "appropriate technology" and "identification and examination of appropriate material relevant to the demarcation of the boundary". It is up to the Commission to examine and identify the relevant documentation and to determine which technology or combination of methods can best be used for the fulfilment of its mandate. In my view it would prejudice the work of the Commission, and even hinder its independence, if at this stage I were to go beyond the level of detail concerning the working methods of the Boundary Commission set out in my draft report.

Finally, your Government objects to paying half of the costs of the demarcation on the ground that its views on the boundary question are not fully being taken into account. However, through your Government's participation in the work of the Boundary Commission its views will find such expression. Together with your Government's acceptance of paragraph 3 of resolution 687 (1991), both in its letter of 6 April 1991 (S/22456) as well as in the letter of 23 April 1991, I can see no basis for objections to the paying of its share of the costs, which will be determined by the Commission.

In the light of your Government's expressed readiness to cooperate with me, I intend to proceed immediately with the establishment of the Commission and will accordingly convey my proposals, together with this exchange of correspondence, to the Security Council.

(Signed) Javier PEREZ DE CUELLAR
Secretary-General

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REPORT OF THE SECRETARY-GENERAL PURSUANT TO PARAGRAPH 19 OF SECURITY COUNCIL RESOLUTION 687 (1991)

INTRODUCTION

1. The present report is submitted pursuant to paragraph 19 of Security Council resolution 687 (1991) of 3 April 1991. In paragraph 16 of that resolution, the Council reaffirmed that Iraq "is liable, under international law, for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait". In paragraph 17 of the resolution, the Council decided "that all Iraqi statements made since 2 August 1990 repudiating its foreign debt are null and void", and demanded that "Iraq adhere scrupulously to all of its obligations concerning servicing and repayment of its foreign debt". The Council also decided, in paragraph 18 of the resolution, "to create a fund to pay compensation for claims that fall within the scope of paragraph 16 ... and to establish a Commission that will administer the fund".

2. In paragraph 19 of the resolution, the Security Council directed the Secretary-General "to develop and present to the Security Council for decision, no later than 30 days following the adoption of the present resolution, recommendations for the fund to meet the requirement for the payment of claims established in accordance with paragraph 18 ..., and for a programme to implement the decisions in paragraphs 16, 17 and 18 ..., including: administration of the fund; mechanisms for determining the appropriate level of Iraq's contribution to the fund based on a percentage of the value of the exports of petroleum and petroleum products from Iraq not to exceed a figure to be suggested to the Council by the Secretary-General, taking into account the requirements of the people of Iraq, Iraq's payment capacity as assessed in conjunction with the international financial institutions taking into consideration external debt service, and the needs of the Iraqi economy; arrangements for ensuring that payments are made to the fund; the process by which funds will be allocated and claims paid; appropriate procedures for evaluating losses, listing claims and verifying their validity and resolving disputed claims in respect of Iraq's liability as specified in paragraph 16 ...; and the composition of the Commission

designated [in paragraph 18]". In making the following recommendations, I have borne in mind the need for maximum transparency, efficiency, flexibility and economy in the institutional framework that will be required for the implementation of the decisions contained in paragraphs 16, 17 and 18 of the resolution.

I. INSTITUTIONAL FRAMEWORK

A. The Fund

3. The Fund created by paragraph 18 of Security Council resolution 687 (1991) will be established by the Secretary-General as a special account of the United Nations. The Fund will be known as the United Nations Compensation Fund (hereinafter referred to as "the Fund"). The Fund will be operated in accordance with the United Nations Financial Regulations and Rules. As a special account of the United Nations, the Fund, therefore, will enjoy, in accordance with Article 105 of the Charter and the Convention on the Privileges and Immunities of the United Nations of 13 February 1946, 1/ the status, facilities, privileges and immunities accorded to the United Nations. The Fund will be used to pay compensation for "any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait" as provided for in paragraph 16 of resolution 687 (1991).

B. The Commission

4. The Fund is to be administered by the Commission established by the Security Council in paragraph 18 of resolution 687 (1991). The Commission, which is to be known as the United Nations Compensation Commission (hereinafter referred to as "the Commission"), will function under the authority of the Security Council and be a subsidiary organ thereof. In accordance with the terms of paragraph 19 of resolution 687 (1991), in carrying out its functions, the Commission will be required to address a variety of complex administrative, financial, legal and policy issues, including the mechanism for determining the level of contribution to the Fund; the allocation of funds and payments of claims; the procedures for evaluating losses, listing claims and verifying their validity; and resolving disputed claims. In the light of the multifarious nature of the tasks to be performed by the Commission, it will, in my view, be necessary to distinguish between questions of policy and the functional aspects of the Commission's work. The Commission should, therefore, operate at a policy-making level and a functional level. A secretariat will be necessary for servicing the work of the Commission at both the policy-making and the functional levels.

C. Structure and composition of the Commission

5. The principal organ of the Commission will be a 15-member Governing Council composed of the representatives of the current members of the Security Council at any given time. The Governing Council will be assisted by a number of commissioners who will perform the tasks assigned to them by the Governing Council. The precise number of commissioners will be determined by the Governing Council in the light of the tasks to be performed. The commissioners will be experts in fields such as finance, law, accountancy, insurance and environmental damage assessment, who will act in their personal capacity. They will be nominated by the Secretary-General and appointed by the Governing Council for specific tasks and terms. In nominating the commissioners, the Secretary-General will pay due regard to the need for geographical representation, professional qualifications, experience and integrity. The Secretary-General will establish a register of experts which might be drawn upon when commissioners are to be appointed.

6. A secretariat, composed of an Executive Secretary and the necessary staff, will be established to service the Commission. The Executive Secretary's primary responsibility will be the technical administration of the Fund and the servicing of the Commission. He will be appointed by the Secretary-General after consultation with the Governing Council. The staff of the secretariat will be appointed by the Secretary-General. The Executive Secretary and staff will serve under the United Nations Staff Regulations and Rules.

D. Status, privileges and immunities of the Commission

7. The Convention on the Privileges and Immunities of the United Nations of 13 February 1946 1/ will apply to the Commission and its secretariat. The members of the Governing Council will have the status of representatives of States, the commissioners will have the status of experts on missions within the meaning of article VI of the Convention and the Executive Secretary and the staff of the secretariat will have the status of officials within the meaning of articles V and VII of the Convention.

E. Expenses of the Commission

8. The expenses of the Commission will be borne by the Fund. More detailed recommendations regarding the budgetary administration of the Commission are set out in paragraph 29 below.

F. Headquarters of the Commission

9. For reasons of economy and practicality, particularly in the secretariat servicing of the Governing Council and the commissioners, the headquarters of the Commission should be in New York. Alternatively, it might be located at the site of one of the two Offices of the United Nations in Europe, i.e.

Geneva or Vienna. The Governing Council may decide whether some of the activities of the Commission should be carried out elsewhere.

G. Functions of the Commission

1. The Governing Council

10. As the policy-making organ of the Commission, the Governing Council will have the responsibility for establishing guidelines on all policy matters, in particular, those relating to the administration and financing of the Fund, the organization of the work of the Commission and the procedures to be applied to the processing of claims and to the settlement of disputed claims, as well as to the payments to be made from the Fund. In addition to its policy-making role, the Governing Council will perform important functional tasks with respect to claims presented to the Commission. Except with regard to the method of ensuring that payments are made to the Fund, which should be decided upon by consensus, the decisions of the Governing Council should be taken by a majority of at least nine of its members. No veto will apply in the Governing Council. If consensus is not achieved on any matter for which it is required, the question will be referred to the Security Council on the request of any member of the Governing Council. The Governing Council may invite States that it considers to have particular interest in its work to participate without a vote in its discussions. It may also invite members of the United Nations Secretariat or other persons to supply it with information or to give other assistance in examining matters within its competence. The Governing Council will, on behalf of the Commission, report periodically to the Security Council.

2. The commissioners

11. The commissioners will, under the guidelines established by the Governing Council, carry out such tasks and responsibilities as may be assigned to them by the Governing Council.

3. The secretariat

12. Under the direction of the Executive Secretary, the secretariat will carry out such tasks as may be assigned to it by the Governing Council and the commissioners, in particular the technical administration of the Fund, and the provision of secretariat services to the Governing Council and the commissioners.

II. THE IMPLEMENTATION OF THE DECISIONS CONTAINED IN PARAGRAPHS 16, 17 AND 18 OF RESOLUTION 687 (1991)

A. Mechanisms for determining the appropriate level of Iraq's contribution to the Fund

13. In accordance with the institutional framework outlined in section I above, it would be for the Governing Council to establish the mechanisms for determining the appropriate level of Iraq's contribution to the Fund in accordance with the criteria laid down in paragraph 19 of Security Council resolution 687 (1991). In carrying out this task, the Governing Council should consider the probable levels of future oil export revenues of Iraq, the amounts of military spending and arms imports in the past, the service of Iraq's foreign debt and the needs for reconstruction and development in the country. The objective should be to settle compensation claims within a reasonable period of time. The Governing Council will, of course, be free to draw upon expert advice as it sees fit. It might wish to be assisted by one or more commissioners who, under the guidance of and within the terms of reference provided by the Governing Council, might give advice with regard to the appropriate level of Iraq's contribution to the Fund as well as to the periodic monitoring of that level of contribution. Simultaneously with the establishment of the Governing Council, I will undertake the appropriate consultations as required by paragraph 19 of resolution 687 (1991) so that, as soon as possible, I will be in a position to suggest the figure not to be exceeded by the Iraqi contribution.

B. Arrangements for ensuring that payments are made to the Fund

14. The arrangements for ensuring payments to the Fund are among the most technical and difficult of the tasks that have been entrusted to the Commission. The decisions taken in this regard will determine, inter alia, the financial viability of the Fund and its capacity to meet the compensation claims decided upon by the Commission as well as the size and organization of the secretariat.

15. In addressing the question of the possible arrangements for ensuring payments to the Fund, there is an obvious necessity for securing constant and reliable financing of the Fund, without which the essential purpose of the Fund will be defeated. It is also desirable to seek modalities for the financing of the Fund that avoid the necessity of legal and other proceedings in a multiplicity of third countries and jurisdictions.

16. The legal basis for the payments by Iraq to the Fund is to be found in paragraph 19 of resolution 687 (1991). Iraq has officially notified the United Nations of its acceptance of the provisions of the resolution, including paragraph 19, in accordance with paragraph 33 of the resolution. It follows from paragraph 19 of resolution 687 (1991) that the method envisaged by the Security Council for the financing of the Fund is a contribution by Iraq based on a percentage of the value of its exports determined in

accordance with the mechanism referred to in paragraph 13 above. It also follows from the resolution that the Security Council did not envisage using "frozen assets" of Iraq held in third countries for the financing of the Fund.

17. Under these circumstances, there are several options for ensuring that Iraq makes payments to the Fund. These options include the following:

(a) Iraq would pay to the Fund the established percentage of the market value of its exports of petroleum and petroleum products; the market value to be calculated on the day of the export. The payment would be effected in United States dollars and made within 30 days of the export from Iraq;

(b) An escrow account would be opened into which Iraq would deposit advance payments of lump sums equivalent to the estimated quarterly or semi-annual contribution required of it. These lump-sum payments would be re-evaluated periodically;

(c) A physical share of the exports would be taken and sold on the market on behalf of the Fund;

(d) The Fund would be designated as either the sole or co-beneficiary on the bill of lading or other title document and any letter of credit issued. The Fund, in turn, would retain its share and remit the remainder to Iraq;

(e) An escrow account provided with the appropriate privileges and immunities (e.g. at a central bank or an appropriate international institution) would be designated as beneficiary on the bill of lading or other title document and any letter of credit issued. The escrow agent would remit to the Fund the sum designated to be used to satisfy claims and the remainder to Iraq.

It would be for the Governing Council to decide among these various options.

18. All of these methods presuppose cooperation by Iraq and strict supervision of the exports of petroleum and petroleum products from Iraq. To this end, the Commission should arrange for appropriate monitoring. Whatever approach is adopted, should Iraq fail to meet its payment obligation, the Governing Council would report the matter to the Security Council.

19. It must be recognized that, in all probability, it may be some time before Iraq is able to resume oil exports. In the short term, the Fund is therefore unlikely to receive revenues, and some consideration will have to be given to the financing of the work of the Commission, a problem which is addressed in paragraph 29 below, but more particularly to the financing of the Fund in the near term from assets other than resumed oil exports by Iraq.

C. Claims procedure

20. The process by which funds will be allocated and claims paid, the appropriate procedures for evaluating losses, the listing of claims and the

verification of their validity and the resolution of disputed claims as set out in paragraph 19 of resolution 687 (1991) - the claims procedure - is the central purpose and object of paragraphs 16 to 19 of resolution 687 (1991). It is in this area of the Commission's work that the distinction between policy-making and function is most important. The Commission is not a court or an arbitral tribunal before which the parties appear; it is a political organ that performs an essentially fact-finding function of examining claims, verifying their validity, evaluating losses, assessing payments and resolving disputed claims. It is only in this last respect that a quasi-judicial function may be involved. Given the nature of the Commission, it is all the more important that some element of due process be built into the procedure. It will be the function of the commissioners to provide this element. As the policy-making organ of the Commission, it will fall to the Governing Council to establish the guidelines regarding the claims procedure. The commissioners will implement the guidelines in respect of claims that are presented and in resolving disputed claims. They will make the appropriate recommendations to the Governing Council, which in turn will make the final determination. The recommendations that follow have been divided for the sake of convenience under three main headings: the filing of claims; the processing of claims; and the payments of claims.

1. Filing of claims

21. With regard to the filing of claims, the Governing Council must first decide in what manner the claims of foreign Governments, nationals and corporations are to be filed with the Commission. It is recommended that the Commission should entertain, as a general rule, only consolidated claims filed by individual Governments on their own behalf or on behalf of their nationals and corporations. The filing of individual claims would entail tens of thousands of claims to be processed by the Commission, a task which could take a decade or more and could lead to inequalities in the filing of claims disadvantaging small claimants. It will be for each individual Government to decide on the procedures to be followed internally in respect of the consolidation of the claim having regard to its own legal system, practice and procedures. The Governing Council may, in addition, consider whether, in exceptional circumstances involving very large and complex claims, a somewhat different procedure could apply. The question might be considered whether such claims, the character of which, of course, would have to be defined by the Governing Council, could be filed individually with the Commission by Governments, nationals or corporations and whether the individual Government, national or corporation could be authorized to present these claims.

22. In this context, there is another matter that requires consideration by the Commission and regarding which the Governing Council should establish guidelines, namely the question of the exclusivity or non-exclusivity of the claims procedure foreseen in paragraph 19 of the resolution. It is clear from paragraph 16 of the resolution that the debts and obligations of Iraq arising prior to 2 August 1990 are an entirely separate issue and will be addressed "through the normal mechanisms". It is also clear from paragraph 16 that the

resolution and the procedure foreseen in paragraph 19 relate to liability under international law. Resolution 687 (1991) could not, and does not, establish the Commission as an organ with exclusive competence to consider claims arising from Iraq's unlawful invasion and occupation of Kuwait. In other words, it is entirely possible, indeed probable, that individual claimants will proceed with claims against Iraq in their domestic legal systems. The likelihood of parallel actions taking place on the international level in the Commission and on the domestic level in national courts cannot be ignored. It is, therefore, recommended that the Governing Council establish guidelines regarding the non-exclusivity of claims and the appropriate mechanisms for coordination of actions at the international and domestic levels in order to ensure that the aggregate of compensation awarded by the Commission and a national court or commission does not exceed the amount of the loss. A particular problem might arise in this regard concerning default judgements obtained in national courts.

23. In addition to deciding on the consolidation of claims, the Governing Council may also wish to establish a categorization of claims according to both type and size. The categorization of claims according to type might, for example, distinguish between claims for loss of life or personal injury and property damage, environmental damage or damage due to the depletion of natural resources. The categorization of claims by size might for example, differentiate between small-, medium- and large-sized claims. A further categorization might be to distinguish between losses incurred by Governments, on the one hand, and losses incurred by nationals and corporations, on the other hand.

24. Governments could be requested by the Governing Council to use these categorizations when filing their consolidated claims. The Governing Council should also establish guidelines regarding the formal requirements for the presentation of claims such as the type of documentation to be presented in support of the claim and the time-delays for the filing of claims. The time-delays should be of sufficient length to permit Governments to establish and implement an internal procedure for the assembling and consolidation of claims. It is recommended that a fixed time period be established for the filing of all claims. A period of two years from the adoption of the filing guidelines would appear to be adequate. Alternatively, the Governing Council could set different filing periods for different types of claims in order to ensure that priority is given to certain claims, for example, loss of life or personal injury. In this respect, I am of the opinion that there would be some merit in providing for a priority consideration of small claims relating to losses by individuals so that these are disposed of before the consideration of claims relating to losses by foreign Governments and by corporations.

2. Processing of claims

25. The processing of claims will entail the verification of claims and evaluation of losses and the resolution of any disputed claims. The major

part of this task is not of a judicial nature; the resolution of disputed claims would, however, be quasi-judicial. It is envisaged that the processing of claims would be carried out principally by the commissioners. Before proceeding to the verification of claims and evaluation of losses, however, a determination will have to be made as to whether the losses for which claims are presented fall within the meaning of paragraph 16 of resolution 687 (1991), that is to say, whether the loss, damage or injury is direct and as a result of Iraq's unlawful invasion and occupation of Kuwait. It is recommended that the Governing Council establish detailed guidelines regarding what constitutes such direct loss for the guidance of all claimants as well as the commissioners.

26. Claims will be addressed to the Commission. The Commission will make a preliminary assessment of the claims, which will be carried out by the Secretariat, to determine whether they meet the formal requirements established by the Governing Council. The claims would then be submitted to verification and evaluation by panels normally comprised of three commissioners for this purpose. In carrying out these tasks, it is recommended that the commissioners be given the necessary powers to request additional evidence, to hold hearings in which individual Governments, nationals and corporations can present their views and to hear expert testimony. The Governing Council might wish to address the question of possible assistance to ensure the adequacy of the representation of countries of limited financial means. Iraq will be informed of all claims and will have the right to present its comments to the commissioners within time-delays to be fixed by the Governing Council or the Panel dealing with the individual claim. Recommendations of the commissioners regarding the verification and evaluation of claims will be final and subject only to the approval of the Governing Council, which shall make the final determination. The Governing Council should have the power to return claims to the commissioners for further revision if it so decides.

27. Where a dispute arises out of the allegation made by a claimant that the Panel of Commissioners, in dealing with its claims, has made an error, whether on a point of law and procedure or on a point of fact, such disputes will be dealt with by a board of commissioners who for this purpose should be guided by such guidelines as have been established by the Governing Council and the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The UNCITRAL Arbitration Rules will be modified as necessary. The final decision will be made by the Governing Council.

3. Payment of claims

28. It is to be anticipated that the value of claims approved by the Commission will at any given time far exceed the resources of the Fund. It will, therefore, be incumbent upon the Commission to decide on an allocation of funds and a procedure for the payment of claims. It is recommended that the Governing Council establish criteria for the allocation of funds, taking into account the size of claims, the scope of the losses sustained by the

country concerned and any other relevant factors. In this connection, it might be necessary to distinguish between Kuwait, on the one hand, and other countries on the other hand. As far as the payment of claims is concerned, it follows from the consolidation of the claims and their filing by individual Governments that payments will be made exclusively to Governments. Individual Governments will be responsible for the appropriate distribution to individual claimants. The Governing Council should establish further guidelines regarding the payment of claims, for example, whether claims should be paid in full or whether percentages should be paid. In the latter case, the unsatisfied portions of the claims will remain as outstanding obligations.

D. Expenses of the Commission

29. The expenses of the Commission, including those of the Governing Council, the commissioners and the secretariat, should in principle be paid from the Fund. However, as some time will elapse before the Fund is adequately financed, consideration must be given to the financial implications of the programme outlined. It is recommended that urgent consideration be given to the means by which the initial costs of the Commission will be met.

Notes

1/ General Assembly resolution 22 A (I).

UNITED
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S/22560
2 May 1991
ENGLISH
ORIGINAL: FRENCH

LETTER DATED 1 MAY 1991 FROM THE CHARGE D'AFFAIRES A.I. OF THE PERMANENT MISSION OF ALGERIA TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

I have the honour to transmit herewith the text of a declaration by the spokesman of the Ministry of Foreign Affairs which was published following the adoption by the Security Council of resolution 690 (1991), concerning the question of Western Sahara.

I should be grateful if you would have this letter and its annex circulated as a document of the Security Council.

(Signed) Amar BENDJAMA
Chargé d'affaires a.i.

Annex

Declaration dated 29 April 1991 by the spokesman for the Algerian Ministry of Foreign Affairs

"Algeria welcomes the unanimous adoption by the Security Council of resolution 690 (1991), which sets out the final arrangements for implementation of the United Nations and Organization of African Unity (OAU) plan for a settlement of the question of Western Sahara and approves the establishment of the United Nations Mission for the Referendum in Western Sahara (MINURSO).

A decisive stage has thus been reached on the path towards a peaceful, just and final settlement of the question of Western Sahara.

The finalization of the pan-African organization's peace plan - for which the United Nations has assumed responsibility - whereby a referendum will be held for self-determination of the people of Western Sahara, without any administrative or military constraints, organized and supervised by the United Nations in cooperation with OAU, is the result of the patient joint efforts of the current Chairman of OAU and the Secretary-General of the United Nations, with the absolute and abiding support of Algeria.

Algeria wishes to pay tribute to Mr. Pérez de Cuéllar and to the successive Chairmen of OAU for the persistent efforts which they have made to facilitate the refinement of this settlement plan and which now point the way to peace in Western Sahara.

Algeria congratulates the Kingdom of Morocco and the Frente POLISARIO on this major achievement in endeavours to secure a settlement of the Western Sahara conflict. It remains convinced that the settlement will have the effect both of consolidating progress made in constructing the Arab Maghreb Union and of promoting peace and stability in the region.

Algeria will spare no effort to ensure that the referendum process takes place in an atmosphere of calm, confidence and respect for the peace plan adopted by the Security Council."

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2 May 1991
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LETTER DATED 2 MAY 1991 FROM THE PERMANENT REPRESENTATIVE OF IRAQ TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

On instructions from my Government, I have the honour to inform you that American and American-Saudi aircraft have continued to violate Iraqi airspace, as follows:

First:

1. American-Saudi air activity on 29/30 April 1991 amounted to 82 sorties, flown by 39 formations in addition to four lone sorties, at altitudes ranging between 3,000 and 9,000 metres and at a speed of up to 720 kilometres per hour.

2. The aircraft were identified as F-14s and F-15s and flew mostly over the areas of Baghdad, Hashimiyah, Kut, Ramadi, Diwaniyah, Karbala, Samarra, Najaf and south of Kirkuk, for purposes of observation and provocation.

Second:

1. American-Saudi air activity on 30 April/1 May 1991 amounted to 34 sorties, flown by 16 dual formations in addition to two lone sorties, at altitudes ranging between 5,000 and 7,000 metres and at a speed of up to 750 kilometres per hour.

2. The aircraft flew mostly over the areas of Baghdad, Hashimiyah, Kut, Habbaniyah, Ba'qubah and Najaf, for purposes of reconnaissance and observation.

I should be grateful if you would have this letter circulated as a document of the Security Council.

(Signed) Abdul Amir A. AL-ANBARI
Ambassador
Permanent Representative

91-14396 2300q (E)

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Security Council

Distr.
GENERAL

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2 May 1991
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LETTER DATED 2 MAY 1991 FROM THE PERMANENT REPRESENTATIVE OF IRAQ TO THE UNITED NATIONS ADDRESSED TO THE SECRETARY-GENERAL

On instructions from my Government and further to our previous correspondence, the latest being letter No. 75 of 29 April 1991, I have the honour to inform you that, at 0245 hours on 29 April 1991, the Iranians bombarded Iraqi forward units in the Iraqi southern-sector district of Harithah with rockets from inside Iranian territory. A total of 10 projectiles fell in the area.

This fresh violation which now joins the list of Iran's previous violations constitutes a breach of the cease-fire between Iraq and Iran and once again demonstrates the Iranian Government's determined and deliberate policy of encroaching on the sovereignty and security of Iraq. My country's Government affirms, as it has on previous occasions, that the Iranian Government is responsible for the damage arising from this serious violation and any consequences thereof.

I should be grateful if you would have this letter circulated as a document of the Security Council.

(Signed) Abdul Amir A. AL-ANBARI
Ambassador
Permanent Representative

91-14402 2248c (E)